

THE GEORGIA SUBSEQUENT INJURY TRUST FUND

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In 1977 the Georgia legislature created the Subsequent Injury Trust Fund (the “SITF” or “Fund”) to encourage the employment of persons with disabilities or pre-existing conditions, and to help control the costs of workers’ compensation claims. O.C.G.A. § 34-9-350

1. Elements Needed To Establish a Claim Against the Subsequent Injury Trust Fund

If an employer/insurer or authorized self-insurer can prove three requirements they are eligible for reimbursement of medical, rehabilitation and income benefits paid out to an employee in the course of their workers’ compensation claim. One must demonstrate:

- (a) a pre-existing, permanent impairment by the employee;
- (b) employer knowledge of the employee’s pre-existing, permanent impairment; and
- (c) merger between the pre-existing condition and the subsequent work injury

Permanent impairment is defined as “any permanent condition due to previous injury, disease or disorder which is, or is likely to be, a hindrance or obstacle to employment.” O.C.G.A. § 34-9-351. Certain conditions like diabetes, epilepsy and cardiovascular disorders are presumed “permanent” and “a hindrance or obstacle to employment.” All the employer has to do is show knowledge of such condition(s) prior to the employee’s work accident. However, if the prior condition is not specifically set forth in O.C.G.A. § 34-9-361, the employer must demonstrate why they considered the condition permanent and an obstacle to the employee’s job duties.

Employer knowledge is established by the employer’s reaching an informed conclusion, prior to the subsequent work injury, that the employee’s preexisting condition or impairment is permanent and likely to be a hindrance or obstacle to employment. O.C.G.A. § 34-9-361. Such knowledge is usually established by an affidavit from someone in an executive, management or supervisory capacity at the company. The affidavit may be based on personal knowledge or “corporate knowledge” on behalf the company. The latter situation arises when, for example, an employee reveals a preexisting condition at the time of hire and this information is documented and kept in their personnel file. In this event the Fund will also require a statement on the employer’s letterhead that such documentation was maintained in the employee’s personnel file.

The final element needed for proving an SITF claim is medical merger. The employer/insurer must show that there has been merger between the employees’s preexisting permanent condition and their subsequent work injury. The Georgia legislature has defined merger as meaning: (a) had the preexisting permanent impairment not been present, the subsequent injury would not have occurred; or (b) the disability resulting from the subsequent injury in conjunction with the preexisting permanent impairment is materially, substantially and cumulatively greater than that which would have resulted had the preexisting permanent impairment not been present. O.C.G.A. § 34-9-351. Practically speaking, an employer/insurer should try and establish medical merger by obtaining a merger statement from one of the employee’s treating physicians. The physician should be able to establish the elements above from his review of the medical records and/or his treatment of the employee.

2. Reimbursement Of Claims and Settlements

The employer/insurer must file a notice of claim against the Fund no later than 78 weeks following the employee's work injury or the payment of 78 weeks of income benefits, whichever occurs last. If a notice is timely filed and all the elements above are satisfactorily proven, the employer/insurer will be entitled to reimbursement of the following: all weekly indemnity benefits paid above 104 weeks, and 100% of all medical and rehabilitation expenses paid above \$10,000.00. Once the deductible levels of 104 weeks of income benefits and \$10,000.00 in medical/rehabilitation expenses have been met the SITF will begin the reimbursement process.

Once the Fund has accepted a claim for reimbursement they are made a party to the workers' compensation case. The Fund must be notified about any proposed settlement agreement between the parties. Significantly, if the parties do not obtain the express consent of the SITF before submitting a proposed settlement agreement to the State Board of Workers' Compensation, and the State Board subsequently approves the settlement, the reimbursement agreement between the employer/insurer and the Fund "shall become null and void."

In September 2008, the Fund initiated a new policy of reimbursing settlements. This was primarily because the Fund began the process of dissolution (see below) and with it the need to structure their remaining funds. Accordingly, for any settlement up to \$75,000.00 the Fund will continue to make reimbursement payments in full as the normal process allows. For any settlement from \$75,000.00 to \$150,000.00 the reimbursement will be paid under an installment plan of \$75,000.00 paid within the first seven to eight months (depending on reimbursement backlog), and the remaining installment on the payment anniversary date twelve (12) months later. For any settlements of \$150,000.00 to \$225,000.00 reimbursement will be paid at the rate of \$75,000.00 per twelve (12) month period, with the second and third payments being automatically issued on the anniversary date of the prior payment. Any settlements above \$250,000.00 will also be reimbursed in three (3) yearly installments.

3. Dissolution Of The Subsequent Injury Trust Fund

In 2005 the Georgia legislature decided to dissolve the Fund. As a result, no SITF claims are accepted for dates of accident occurring after June 30, 2006, although the Fund continues to reimburse qualifying claims for accidents prior to that date. Additionally, for claims which have been filed but not yet perfected the Fund has set an outside time limit to accomplish that task.

Pursuant to O.C.G.A. § 34-9-362(d) an employer/insurer has only until June 30, 2009 to perfect their claim for any cases where the notice of claim was filed on or before July 1, 2006. For notices of claim filed after July 1, 2006 the employer/insurer has three years from that date to perfect their claim. O.C.G.A. § 34-9-362(e). In either scenario, if a reimbursement agreement is not received from the Fund within the three year timeframe the reimbursement claim will be automatically denied.

As a result, and because there is little an employer/insurer can do once an SITF package is submitted for review, all information needed to perfect the claim (i.e., employer knowledge affidavit, merger statement, medical records and indemnity/medical payout totals) should be sent to the Fund as soon as possible. For cases with notices of claim filed on or before July 1, 2006 the Deputy Administrator has advised such information should be received by the end of March 2009 so they have time to issue a Reimbursement Agreement before June 30, 2009. Finally, if a reimbursement agreement is not received by the deadline, the employer/insurer should file a hearing request before the State Board no later than 20 days from the cutoff date to preserve their right to pursue reimbursement from the Fund.